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PEREZ v. FERNANDEZ—CONFLICT BETWEEN CIVIL AND COMMON LAW IN OUR NEW POSSESSIONS.

This case may be found in 202 U. S. 80. We made some comments upon it when it appeared in 26 Sup. Ct. Rep. 561 (see 62 Cent. L. J. 357), but the question is one of importance, and upon mature consideration we are impressed with the idea that the dissenting opinion is well founded.

The supreme court admits that, according to common law or its own decisions its position would not find support. The fact is that the common law referred to, comes directly from the civil law as it was administered in the days of Cicero and Justinian, whether in Jerusalem, Antioch, England or Rome, and as was aptly said by David Dudley Field, "the Roman still holds dominion over this world by the silent empire of his law." Therefore, it would seem as though it would have been safe to have assumed that our laws were in accord.

The facts in this case are as follows: Perez was sued in attachment by Fernandez and others, not named upon the record, in a federal court in Porto Rico. This court succeeded to the jurisdiction of the former Spanish courts. Under the Spanish law it was provided that damages might be assessed upon the attachment bond along with and at the trial of the issues of attachment, upon the request of the defendant, if he desired it. This request Perez did not make, and no damages were assessed. After the trial of the attachment issues, Perez sued Fernandez and another party, who directed, controlled and managed the litigation, for damages for malicious attachment, and recovered a judgment against them for $7,000. The case was removed on error, wherein the judgment debtors contended that the court had no jurisdiction of the subject-matter, for the reason that it could and might have been decided in the trial of the attachment issues. This question was submitted upon the mandatory record, as no statutory record (bill of exceptions) was ever filed in this case; no objections or exceptions were made in the trial court. Only the judgment and its foundations were submitted for matter and reasons for reversal. Upon these facts the court reversed the case. It was held that one could not split his cause of action; that a failure to plead *res adjudicata* made no difference; that errors shown from the mandatory record need neither objection, exception or statutory ceremonies to make them available in a court of errors; that such a court will take judicial notice that the damages might have been assessed at the trial of the attachment issues; and that a cause of action for damages ceased to exist by the failure to ask for the assessment.

But suppose there had been a plea of *res adjudicata*, would the court have regarded it as surplusage and struck it out as such? This would seem to be the logic of the court's judgment. There is no question but that Perez could have had an independent action upon the attachment bond just as he could have had an action upon an injunction bond after dissolution of an injunction against Fernandez and his confederate in any court of competent jurisdiction.

Convenience is a factor of the law and must be considered as a part thereof. It was probably inconvenient, or perhaps impossible, to have brought the confederate before the court so as to have included him in the decree, and it would be very instructive to know by what process the confederate could have been brought before the court in this ancillary proceeding, when his name did not appear on the record proper. It is impossible to escape the conclusion that it could not have been done except upon what would have amounted to an original process, and that would have given him the right to have formed issues and had a trial.

This case illustrates the troubles which have arisen or may arise from the effort to introduce foreign laws to guide the judgment of the court without a full view of them. It would seem, from the general principles of the civil law, as though it would follow that, where a remedy was merely cumulative, as in this case, that the failure to avail oneself of one of them, could not be regarded as *res adjudicata* as to the other upon such a record as the supreme court had before it. We believe that the long standing principles of our

own law will be found to accord with those of the civil law, from which our own are borrowed to a much greater extent than is generally thought. At any rate, there seems to us to have been plenty of room for the dissenting opinion of Mr. Justice White, concurred in by Mr. Justice McKenna, and that the court in its opinion has refrained from following its own well settled principles which it so strictly adhered to in the Haddock case. "Laws should be made to harmonize with laws." It would seem as though it would be a good thing to harmonize the laws of our insular possessions with the laws of our highest court at the earliest opportunity. The extended view of the principles involved in Windsor v. McVeagh, 93 U. S. 274, 23 L. Ed. 914, 4 Cent. L. J. 66, will be found on consulting Hughes on Procedure to have had a firm footing in the Roman law. The single authority given by the court to support its opinion, to say the least, is not a satisfactory one, and is repugnant to our ideas of justice.

NOTES OF IMPORTANT DECISIONS.

DAMAGES—WATER ESCAPING FROM RESERVOIR.—The case of Wiltse v. City of Redwing (Minn.), 109 N. W. Rep. 114 presents a case which seems to have been decided against the weight of authority, but in line with the previous decisions of the Minnesota Supreme Court and the house of lords, in the case of Rylands v. Fletcher, L. R. 3 H. L. 330, which was the basis of the Minnesota law upon the subject. It seems in this case that the defendant constructed a reservoir on its premises 150 feet above the premises of the plaintiff, and brought into and stored therein some 800,000 gallons of water for use in connection with its system of waterworks. The reservoir gave way and the water was thrown upon the premises of the plaintiff in such volume and with such force that they were practically ruined thereby. The trial court submitted the case to the jury upon the question of the city's negligence in fact. The plaintiff resisted the motion for a new trial upon the ground, among others, that upon the undisputed and admitted facts the verdict was right because, under the rule of this court established in the cases in Cahill v. Eastman, 18 Minn. 324 (Gil. 292), 10 Am. Rep. 184; Knapheide v. Eastman, 20 Minn. 478 (Gil. 432); and Berger v. Minneapolis Gas Co., 60 Minn. 296, 62 N. W. Rep. 336, the city was liable, without proof of negligence, for all damages directly due to the water which escaped from its control. The trial court adhered to its ruling on the trial when it refused to give the plaintiff's request, based on the cases cited, and held that the city was only liable for negligence in fact, and that there was no evidence to sustain a finding by the jury that it was thus negligent. It is obvious that if the city in this case was only liable for the damages sustained by the plaintiff upon proof by her of its actual negligence, then the order granting a new trial must be affirmed. On the other hand, if the city was liable without such proof being made, then the order must be reversed.

This brings us to the question whether the case is controlled by the cases cited. The learned trial judge attached to his order a very able and exhaustive memorandum in which the adjudged cases were reviewed, and which seems to demonstrate that the doctrine of Rylands v. Fletcher, L. R. 3 H. L. 330, upon which the cases in this court are based, has been rejected as unsound in principle by a majority of the adjudged cases in this country. The question, however, is not an open one in this state, and the contention of the plaintiff must be sustained unless the cases in this court cited on her behalf are overruled. This we are not prepared to do for we ought to adhere to the former decisions of the court "unless they are clearly and manifestly erroneous or no longer adapted to changed conditions of society." State v. Manford (Minn.), 106 N. W. Rep. 908. The rule to be deduced from the decisions of this court is to the effect that a party who, for his own profit, keeps on his premises anything not naturally belonging there, *the natural tendency of which is to become a nuisance and to do mischief if it escapes*, is liable if it escapes, without proof of negligence, for all damages directly resulting therefrom. The only modification of the rule as stated in general terms in Cahill v. Eastman, made by the decision in the case of Berger v. Minneapolis Gas Co., was to add the clause we have italicized. In the Cahill Case the damages were occasioned by the construction of a tunnel on the defendant's own premises through which the water rushed in destructive quantities upon plaintiff's premises. In that case, as in this, the complaint alleged negligence in fact which was denied by the answer, and yet it was held that the plaintiff could recover without proof of such negligence. The rule applies to the defendant for, although a municipal corporation, it was engaged in the business of supplying water to its inhabitants for profit, an undertaking of a private nature. This case then cannot be distinguished from the Cahill and later cases. The 800,000 gallons of water which the defendant brought into its reservoir did not naturally belong there, and its natural tendency was to do mischief if it escaped. It follows that the plaintiff, upon the undisputed facts, was entitled, as a matter of law, to recover whatever damages she had sustained by the escaping of the water from the defendant's reservoir, and that the trial court erred in setting the verdict aside and granting a new trial.

There is no doubt in our minds that the Minne-

sota court decided the case properly on principle. We are sorry the court did not quote the principle involved. By keeping principles in view in all the cases there is something fixed to which a court may tie and other courts will be guided right. In the case of Gilson v. Delaware, etc., Canal Co., 65 Vt. 213, 36 Am. St. Rep. 802, is to be found a very able discussion of the principle involved in the principal case, and a valuable note to the case, as reported in the Am. St. Rep. On page 805 of the Am. St. Rep.. *supra*, we find the following: In Rylands v. Fletcher, *supra*, Lord Cranworth says, that in considering whether a defendant is liable to plaintiff for damages that the latter has sustained, the question generally is, not whether the defendant has acted with due care and caution, but whether his acts occasioned the damage; that this is all well explained in the old case of Lambert v. Bessey, T. Raym. 421; that the doctrine is founded in good sense, for where one in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer; that he is bound to so use his own as not to injure another.

A valuable consideration of this matter may be found in Hughes on Procedure, Vol. 2, p. 622, where the authorities, *pro* and *con*, may be found. Rylands v. Fletcher is denied in Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372, 1 Thomp. Neg. 61, Smith Cas. Torts, 357, Burdick Cas. Torts 104, 13 Am. Law Rep. 364, 1 Sedgwk. Damages, 33, 36.

ORDINANCES AND RESOLUTION DISTINGUISHED AS RELATE TO LEGISLATIVE, QUASI LEGISLATIVE, AND MINISTERIAL ACTS ON THE PART OF THE COUNCIL OR GOVERNING LEGISLATIVE BODY.

1. The Question Stated.
2. Ordinance and Resolution Distinguished.
3. How Question of Ordinance or Resolution Determined.
4. Dual Powers of Municipal Corporation.
5. Illustrations as to when Act is to be done by Ordinance or Resolution.

1. *The Question Stated.*—Failure to observe prescribed legal form on the part of governing legislative bodies, or councils, of municipal corporations in performing their public functions, has been the source of prolific litigation, most of which could have been avoided by accurate knowledge of charter requirements and due attention to the business at hand. Courts are constantly called upon to determine whether a given corporate act, providing for extensive public improvements, as streets, sewers, lighting, water supply, etc., involving heavy expenditures of money, should have been taken by ordinance, or mere order or resolution. Certain general and leading principles, pointing to the proper method of accomplishing any contemplated action, may be deduced from the numerous adjudications, notwithstanding the great diversity of fixed forms of procedure abounding in the multitude of municipal charters of this country. It is the purpose of this article to consider some of these rules.

2. *Ordinance and Resolution Distinguished.*—It is a well settled rule of municipal corporation law, that the corporation cannot accomplish by an order or resolution that which, under its charter and the legislative acts applicable, can be done only by an ordinance which is technically and formally a legislative act.[1] Therefore, it becomes important to distinguish clearly the difference between an ordinance and a resolution. Ordinances are local laws of municipal corporations, duly enacted by the proper authorities, prescribing general, uniform and permanent rules of conduct, relating to the corporate affairs of the municipality. An ordinance prescribes a permanent rule of conduct or government, while a resolution is of a temporary character only. The former is in the nature of a local law, while the latter is special, temporary and limited in its character or application.[2] All legislative and permanent acts of a general character, regulating the affairs of the local corporation should be in the form of ordinances and not in the form of resolutions, as for example, the issuing of bonds to aid in the construction of a sewer.[3] A resolution is an order of the council or governing legislative body, relating to some function of the corporation in its ministerial capacity; it is intended for a temporary purpose; whereas

[1] Central v. Sears, 2 Colo. 588; Bearden v. Madison, 73 Ga. 184; Pimentall v. San Francisco, 21 Cal. 351; State v. Tryon, 3 Conn. 183; Anderson v. O'Connor, 98 Ind. 168; Starr v. Burlington, 45 Iowa, 87; People v. Crotty, 93 Ill. 180; Nevada v. Eddy, 123 Mo. 546; Patterson v. Barnett, 46 N. J. L. 62; Burmeister v. Howard, 1 Wash. Ty. 207.

[2] Walla Walla v. Walla Walla Water Co., 172 U. S. 1; 2 Abbott, Mun. Corp. 514; Tiedeman, Mun. Corp., sec. 140; State v. Ferguson, 33 N. H. 424. A resolution is designed to reach special and individual cases. Thompson, Corp., sec. 937.

[3] State v. Barnet, 46 N. J. L. 62.

an ordinance prescribes a permanent rule of conduct of government.[4] An ordinance is regarded as a formal law, and all the formalities prescribed by the charter, or the general laws applicable, must be observed in its passage; and in its construction and interpretation those principles control that are applied in the determination of the legality of legislative acts of superior bodies.[5] Matters concerning which the municipal corporation desires to legislate and which relate to its functions as a local governmental organ, in which the local community at large are concerned in their aggregate capacity—matters wherein it is performing its functions as a local sovereignty—must be put in the form of an ordinance, while all acts that are done in a mere ministerial capacity, or in its proprietary capacity as a business organization, may be put in the form of resolutions, unless the charter forbids, and commands a formal legislative enactment.[6] Some municipal charters provide, either in express terms or in substance (or this meaning is implied), that every "legislative act" shall be by ordinance.[7] A municipality may only legislate through the passage of an ordinance and not by the passage of a mere resolution.[8] A general ordinance cannot legally provide that legislative power may be exercised by resolution, for the plain reason that the ordinance cannot change the charter any more than a legislative act of the state can supersede a provision of the constitution of the state.[9]

The distinction acquires further importance when the charter prescribes that ordinances and by-laws shall be submitted to the mayor for approval, whereas, usually, resolutions need not be, for the passage of the latter is generally not a legislative act.[10] Where under the particular municipal organization the mayor is a constituent part of the legislative power his approval of all legislative acts is necessary to their validity.[11] If the resolution is passed with all the formality of an ordinance it thereby becomes a legislative act to all intents and purposes, and the fact that it is called a resolution is not important, since the form of designation is not material. The rule that the law concerns itself more with substance than mere form is of general application.[12] However, such resolution not approved by the mayor, where his concurrence is essential to validate municipal legislation, has not the effect of an ordinance.[13] It is no objection to the validity of a by-law that it was enacted in the form of a resolution.[14]

3. *How Question of Ordinance or Resolution Determined.*—Whether the act in question should be done by ordinance or resolution must depend upon the proper construction of the organic law of the municipal corporation and the forms observed in doing the act. The general rule is that, if the act is to be done by the governing or legislative body, usually designated the council, and the municipal charter is silent as to the mode, it may be done by resolution; however, if such act is in its essence a legislative act, as above defined, it must be signed by the mayor, unless passed over his veto, in accordance with legal procedure.[15] Thus, where the charter re-

[4] 1 Dillon, Mun. Corp. (4th Ed.), sec. 307, note; Altamont v. B. & O. S. W. Ry. Co., 184 Ill. 47; C. & N. P. Ry. Co. v. Chicago, 174 Ill. 439.

[5] 2 Abbott, Mun. Corp., sec. 517.

[6] Alma v. Guaranty Savings Bank, 19 U. S. App. 622; Blanchard v. Bissell, 11 Ohio St. 103; Citizens' Gas, etc., Co. v. Elwood, 114 Ind. 332; Grimmell v. Des Moines, 57 Iowa, 144; State v. Bayonne, 35 N. J. L. 335.

[7] Charter of Consolidated City and County of San Francisco, Art. 2, Sec. 8; Chicago v. McCoy, 136 Ill. 344; Patterson v. Barnet, 46 N. J. L. 62; Shaub v. Lancaster, 156 Pa. St. 362, 21 L. R. A. 691, 26 Atl. Rep. 1067; Springfield v. Knott, 49 Mo. App. 612; Newman v. Emporia, 32 Kan. 456; Daniels v. Burford, 10 Up. Can. Q. B. 478.

[8] People v. Mount, 186 Ill. 560, 571, 58 N. E. Rep. 369.

[9] Cape Girardeau v. Fougeu, 30 Mo. App. 551.

[10] Burlington v. Dennison, 42 N. J. L. 165, disapproving Kepner v. Commonwealth, 40 Pa. St. 124.

[11] C., R. I. & P. R. R. Co. v. Council Bluffs, 109 Iowa, 425, 80 N. W. Rep. 564; Saxton v. Beach, 50 Mo. 488; Saxton v. St. Joseph, 60 Mo. 153; Thompson v. Boonville, 61 Mo. 282; Irvin v. Devors, 65 Mo. 625; Trenton v. Coyle, 107 Mo. 193, 17 S. W. Rep. 643; Crutchfield v. Warrensburg, 30 Mo. App. 456.

[12] Pollock v. San Diego, 118 Cal. 593; Crawfordsville v. Braden, 130 Ind. 149; Tipton v. Norman, 72 Mo. 380; McGavock v. Omaha, 40 Neb. 64; San Antonio v. Micklejohn, 89 Wis. 79; Green Bay v. Brauns, 50 Wis. 204; Sower v. Philadelphia, 35 Pa. St. 251; Green v. Cape May, 41 N. J. L. 45.

[13] Central v. Sears, 2 Colo. 588; Waln v. Philadelphia, 99 Pa. St. 330; Crutchfield v. Warrensburg, 30 Mo. App. 456.

[14] Thompson, Corporations, sec. 936.

[15] Eichenlaub v. St. Joseph, 113 Mo. 395, 402, 21 S. W. Rep. 8; Halsey v. Rapid Transit Co., 54 N. J. L. 102, 20 Atl. Rep. 859; Butler v. Passaic, 44 N. J. L. 171; Green v. Cape May, 41 N. J. L. 45; State v. Jersey City, 27 N. J. L. 493; Pollok v. San Diego, 118 Cal. 593, 50 Pac. Rep. 769; Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. Rep. 849; Burlington v. Dennison, 42 N. J. L. 165; Bigelow v. Perth Amboy, 25 N. J. L. 297;

quires every resolution affecting the interests of the city to be presented to the mayor for his approval, a resolution authorizing the removal of night soil from the city must be presented to the mayor for his signature.[16] But the fact that the charter does not in express terms require an act to be done by ordinance, it does not necessarily follow that it may be effected by a mere resolution. On the contrary, where the requirement that the corporate act should be done by ordinance is implied by necessary inference (as where it is a clear legislative act) a resolution is not sufficient, but an ordinance is indispensable.[17] To determine whether a resolution is sufficient for the given purpose it is necessary to consider the nature of the act sought to be authorized, agreeably to the rules above outlined, the language of the particular charter and the legislative acts applicable, and the question whether the formalities required in case of ordinances have been followed in passing and publishing the resolution. The requirements as to doing specified acts are not uniform in the various municipal charters. In some cases acts which are essentially legislative are allowed to be done by resolution, but the general rules herein stated are usually enforced when the propriety of doing the act by resolution arises.

The rule that in the absence of specific charter mandate, a resolution will suffice, is well illustrated in a late Utah case, which holds that power given to the municipal council "to construct and maintain waterworks * * or to authorize the construction and maintenance of the same by others," confers power to contract for the construction and maintenance of a system of waterworks by resolution. The court took the position that the making of such contract was an exercise of the business powers and functions of the municipality, and was not in any sense legislative in character, and invoked the rule that where a municipal corporation, in the exercise of its business powers, makes an authorized contract, it has the same rights and remedies, and the obligations imposed thereby are the same as those accorded to and incurred by individuals.[18]

4. *Dual Powers of Municipal Corporation.*—The point under consideration will be better understood by considering the two-fold character of municipal corporations: The one as regard the state at large in so far as they are its agents in government; the other private, in so far as they provide the local necessities and conveniences for their own citizens. In other words, a municipal corporation "possesses two kinds of powers, one governmental and public, and to the extent they are held and exercised, is clothed with sovereignty; the other, private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes; the latter for private purposes. While in the exercise of the former the corporation is a municipal government, and while in the exercise of the latter it is a corporate legal individual."[19]

The dual powers of a municipal corporation have been clearly and succinctly stated by United States Circuit Judge Sanborn, as follows: "A city has two classes of powers,—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, *quasi*-private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise

Kepner v. Commonwealth, 40 Pa. St. 124; Lincoln St. Ry. Co. v. Lincoln, 61 Neb. 109, 84 N. W. Rep. 802; Chicago, etc., R. R. Co. v. Chicago, 124 Ill. 439; Chicago v. McKechney, 91 Ill. App. 442.

[16] Dey v. Jersey City, 19 N. J. Eq. 412.

[17] People v. Mount, 186 Ill. 560, 573, 58 N. E. Rep. 560; Atchison Board of Education v. DeKay, 148 U. S. 591, 599; Newman v. Emporia, 32 Kan. 456, 4 Pac. Rep. 815.

[18] Ogden City v. The Bear Lake and River Waterwork and Irrigation Co., 28 Utah, 25, 42, citing 1 Dillon, Mun. Corp. (4th Ed.), sec. 472.

[19] Per Foote, J., in Lloyd v. Mayor, etc., of New York, 5 N. Y. 369, 374, 55 Am. Dec. 347; Maxmillan v. New York, 62 N. Y. 160, 164, 20 Am. Rep. 468; Edgerly v. Concord, 62 N. H. 8; Springfield, etc., Ins. Co. v. Keeseville, 148 N. Y. 46, 30 L. R. A. 660; Caspary v. Portland, 19 Oreg. 496, 24 Pac. Rep. 1036.

it is to be governed by the same rules that govern a private individual or corporation.[20] In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens."[21]

5. *Illustrations as to when Act is to be Done by Ordinance or Resolution.*—The Supreme Court of Illinois has held that, in exercising the power of licensing, an ordinance is required. The court expressed the opinion that this is a subject which in its nature demands legislation of a permanent character and of continuing force and effect, notwithstanding the fact that the license under the general law can only extend for a limited time, as for example, one year.[22] So an ordinance is necessary to amend and repeal an ordinance.[23] The acts which amend, modify or repeal a law should be of equal dignity with the acts which establish the law. A resolution or order is not a law, but merely the form in which the legislative body expresses an opinion.[24] For the same reason salaries regulated by ordinances can be changed only by ordinance.[25]

In providing for public improvements some charters require a formal legislative act,[26] as in ordering the issuing of bonds for the construction of sewers,[27] directing the grading of a street, changing street grades, altering the width of a sidewalk, reconstructing streets and street improvements generally.[28] Under some charters particular improvements may be authorized by order, or resolution or ordinance.[29] In the construction of some charters the courts have held that an ordinance is necessary to provide for the appointment of a commissioner to assess damages.[30] So, to make a contract for the employment of legal services,[31] and in creating offices and situations under the local government and its departments, and in fixing the permanent compensation to be paid officers, employees and servants, an ordinance is usually required.[32] Under some charters the salary of municipal officers may be fixed by resolution.[33] As most municipal charters are construed, municipal corporations which have power to confer the right to use streets and public ways for railroad tracks, gas and water pipes, subways and underground conduits, poles, wires, etc., or to obstruct public places

[20] Dillon, Mun. Corp. (4th Ed.), sec. 66, and cases cited in the note; Safety Insulated Wire & C. Co. v. Baltimore, 13 C. C. A. 375, 377, 378, 66 Fed. Rep. 140, 143, 144, 25 U. S. App. 166; San Francisco Gas Co. v. San Francisco, 9 Cal. 453, 468, 469; Commonwealth v. Philadelphia, 132 Pa. 288; New Orleans Gaslight Co. v. New Orleans, 42 La. Ann. 188, 192; Tacoma Hotel Co. v. Tacoma Light & W. Co., 3 Wash. 316, 325, 14 L. R. A. 669; Wagner v. Rock Island, 146 Ill. 139, 154, 155, 21 L. R. A. 519; Vincennes v. Citizens' Gaslight Co., 132 Ind. 114, 126, 16 L. R. A. 485; Indianapolis v. Indianapolis Gaslight & C. Co., 66 Ind. 396, 403; State v. Atlantic City, 49 N. J. L. 558, 562.

[21] Illinois Trust and Savings Bank v. Arkansas City, 76 Fed. Rep. 271, 22 C. C. A. 181, 34 L. R. A. 518, quoted with approval in Ogden City v. The Bear Lake and River Waterworks and Irrigation Co., 28 Utah, at pp. 42 and 43; Abbott, Mun. Corp., sec. 7; 20 Am. & Eng. Ency. of Law (2nd Ed.), p. 1131; People v. Detroit, 28 Mich. 228; State v. Denny, 118 Ind. 449; Atkins v. Randolph, 31 Vt. 226; Oliver v. Worcester, 102 Mass. 489; Roberts v. Louisville, 92 Ky. 95, 13 L. R. A. 844, 17 S. W. Rep. 216.

The difference between legislative and ministerial acts is illustrated in proceedings to inquire into the motives of the members of the council, and injunction proceedings to restrain certain contemplated action on the part of the council. McQuillin, Mun. Ord., secs. 161 to 163, and cases.

[22] People v. Mount, 186 Ill. 560, 58 N. E. Rep. 360.

[23] Cascaden v. Waterloo, 106 Iowa, 676, 77 N. W. Rep. 433; Young v. St. Louis, 47 Mo. 492.

[24] People v. Mount, 186 Ill. 560, 58 N. E. Rep. 360; Jones v. McAlpine, 64 Ala. 511.

[25] Hiese v. Charleston, 62 Mo. App. 380.

[26] Nevada v. Eddy, 123 Mo. 546; Carlyle v. Clinton County, 140 Ill. 511, 30 N. E. Rep. 782; East St. Louis v. Albrecht, 150 Ill. 506, 37 N. E. Rep. 934; Indianapolis v. Miller, 27 Ind. 394; Sloan v. Beebem, 24 Kan. 343.

[27] State v. Barnet, 46 N. J. L. 62.

[28] Cross v. Morristown, 18 N. J. Eq. 305; Farrell v. Rammelkamp, 64 Mo. App. 424; Kroffe v. Springfield, 86 Mo. 530; Clay v. Mexico, 92 Mo. App. 611; Ritterskamp v. Stifel, 59 Mo. App. 510.

[29] State v. Armstrong, 54 Minn. 457, 56 N. W. Rep. 97; Nappa v. Easterby, 76 Cal. 222, 18 Pac. Rep. 253; Cory v. Campbell, 25 Ohio St. 134; Indianapolis v. Imberry, 17 Ind. 175; Board of Commissioners v. Silvers, 22 Ind. 491; Barber Asphalt Paving Co. v. Edgerton, 129 Mo. 455, 25 N. E. Rep. 436; Grimmell v. Des Moines, 57 Iowa, 144, 10 N. E. Rep. 330; Leomeister v. Conant, 139 Mass. 384, 2 N. E. Rep. 690; Sower v. Philadelphia, 35 Pa. St. 231; Buckley v. Tacoma, 9 Wash. 253, 37 Pac. Rep. 431; Hall v. Racine, 81 Wis. 72, 50 N. E. Rep. 1094; Wright v. Forrestal, 65 Wis. 341, 27 N. E. Rep. 52.

[30] State v. Reegan, 33 N. J. L. 39.

[31] Bryan v. Page, 57 Tex. 532.

[32] Brazil v. McBride, 69 Ind. 244; Walker v. Evansville, 35 Ind. 393; Smith v. Commonwealth, 41 Pa. St. 335; Central v. Sears, 2 Colo. 588; Tacoma v. Lillis, 4 Wash. 797, 18 L. R. A. 72, 37 Pac. Rep. 321; Sommerville v. Wood, 129 Ala. 369, 30 So. Rep. 280; Anderson v. Camden, 38 N. J. L. 515, 33 Atl. Rep. 846.

[33] Green Bay v. Brauns, 50 Wis. 204.

for any purpose, except temporary, must exercise such power by formal legislative act.[34] Prior corporate acts may be confirmed by resolution.[35] So, a resolution has been held sufficient ordering the conveyance of corporate property.[36] Many other acts have been held well performed by a mere resolution, as prescribing the amount of a license theretofore authorized to be imposed by ordinance,[37] waiving the time of the performance of a municipal contract,[38] accepting a dedication of property for public purposes,[39] authorizing the purchase of fire department apparatus,[40] and authorizing an agent of the corporation to enter into a specific contract and to appoint municipal agents.[41]

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[34] State v. Newark, 54 N. J. L. 102, 23 Atl. Rep. 287; West Jersey Traction Co. v. Shivers, 58 N. J. L. 124, 33 Atl. Rep. 55; Hunt v. Lambertville, 45 N. J. L. 279; People's Gaslight Co. v. Jersey City, 46 N. J. L. 297; Indianapolis v. Miller, 27 Ind. 394.

[35] San Francisco Gas Co. v. San Francisco, 6 Cal.190.

[36] Morgan v. Johnson, 106 Fed. Rep. 452, 45 C. C. A. 421.

[37] Burlington v. Ins. Co., 31 Iowa, 102.

[38] Hubbard v. Norton, 28 Ohio St. 116.

[39] State v. Elizabeth, 37 N. J. L. 432.

[40] Green v. Cape May, 41 N. J. L. 45.

[41] Alton v. Mulledy, 21 Ill. 76; Elgin v. Chicago, 5 Ill. App. 70.

PROCESS—VALIDITY OF CONSTRUCTIVE SERVICE ON NON-RESIDENT DEFENDANTS—RULE OF HADDOCK v. HADDOCK CONSTRUED.

STATE OF UTAH *ex rel.* ALDRACH v. MORSE, JUDGE OF THE THIRD JUDICIAL DISTRICT COURT.

Supreme Court of Utah, October, 1906.

A trial court may properly refuse to entertain jurisdiction of a suit for divorce instituted on constructive service, in view of the fact that such jurisdiction has been questioned by the Supreme Court of the United States until the application of the rule of that decision to the particular state has been determined by the highest state tribunal.

While under the rule of Haddock v. Haddock, all actions for divorce, where defendant is a non-resident, and service is constructive, are actions *in persona*, yet where it further appears that the domicile of the plaintiff's husband and the matrimonial domicile of the parties were in a particular state, such additional elements are sufficient to confer jurisdiction upon the court to render a valid decree, notwithstanding the service was constructive only, and further that such decree would be valid and binding in other states by virtue of the full faith and credit clause of the federal constitution.

Opinion of Hon. S. R. THURMAN, Hon. A. L. HOPPAUGH, and Hon. C. C. DEY, *amici curiae.*

The respondent, a judge of the Third District Court of the state of Utah, declined to make and enter a decree in a divorce case in which the petitioner was plaintiff, after filing findings of fact and conclusions of law showing that she was clearly entitled to the relief sought. The respondent refused to proceed in the cause on the grounds that he was without jurisdiction, it appearing that the defendant in the cause was a non resident of the state of Utah, and had not been served with summons or notice otherwise than by publication, or what is known as "constructive service." As we understand the contention of the respondent, he does not dispute the fact that an overwhelming majority of all the states of the Union claim and exercise the power, through the judicial arm of the state, of granting relief by decree in such a case as this, irrespective of the force and effect such decree may have beyond the boundaries of the state in which the decree is rendered. Respondent does contend, however, that a judgment or decree of a court, if valid where made, should be held valid in every other state in the Union under the full faith and credit clause of the federal constitution. As a corollary of the foregoing proposition, respondent also contends that unless a judgment or decree rendered by a court in one state is entitled, by virtue of the constitution, to full faith and credit in every other state, it must of necessity be invalid in the state where rendered. The logic of these propositions seems incontrovertible when we come to consider Sec. 1 of Art. IV of the federal constitution, which, in part, reads as follows: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Holding steadfastly to these views, respondent declined to exercise jurisdiction in the case at bar in view of the case of Haddock v. Haddock, recently decided by the Supreme Court of the United States, and reported in 201 U. S. 562. In that case it was held by the court that a decree of divorce rendered in Connecticut, in favor of a plaintiff domiciled and residing therein, against a non-resident defendant, residing in New York, wherein only constructive service was had, was not obligatory or binding upon the state of New York, notwithstanding the provision of the federal constitution above quoted. Proceeding upon the proposition that the decision in said case is binding upon the courts of this state as to the federal question involved, and holding to the views above mentioned that unless a decree rendered by him would be valid and binding extra-territorially it would not be binding in the state of Utah, he declined to make or render a decree in said cause, but did make full and complete findings of fact showing that the petitioner was entitled to a divorce if the court had jurisdiction to grant it, thereby enabling the petitioner to institute this proceeding to correct the error, if error he had committed, in the

course pursued. Respondent certainly had reason to believe that the decision of the Supreme Court of the United States, in the case referred to, treated the case before it as an action *in personam* and if he was right in his belief, and such be a correct view of the law, it is difficult to see how a decree obtained against a non-resident of the state, where only constructive service upon the defendant is had, can stand and be considered valid even in the state where the decree is rendered, unless an action for divorce is an exception to the general rule. It is fundamental and elementary, and we presume will not be disputed by counsel for petitioner, that in a personal action against a non-resident, unless the court acquires jurisdiction of the defendant by personal service, the proceeding is void even in the state where the proceeding is had. As to whether the Supreme Court of the United States, in the decision referred to, does hold generally that proceedings in divorce are personal actions we are not entirely free from doubt, but certainly it must be admitted that the language used in some parts of the decision is at least susceptible of that construction. Therefore, as friends of the court, in which capacity alone we present these views, and independent of the conclusions we may reach before concluding this discussion, we deem it proper and just to say that the respondent, in view of the issues involved in the question presented, and the consequences that might be entailed by the exercise of a jurisdiction not warranted by law, especially in cases of this kind, was justified in refusing to make and enter a decree in said cause until his power and authority so to do had been determined by this honorable court. Before commenting upon the decision of the supreme court in the case referred to, which decision seems to have been the basis of respondent's action in the matter complained of by the petitioner, we deem it advisable to briefly state the issues presented by the Haddock case in the courts below:

In 1899 the wife of Haddock sued him in the State of New York for a divorce, and there obtained personal service upon him. They were married in New York, where both resided at the time alleged by the complaint; that he immediately abandoned her, and thereafter failed and neglected to support her. This was the case presented by the wife. To this the defendant Haddock replied, among other things, that in 1881, eighteen years before the wife's suit in New York, he had obtained a divorce from her in the state of Connecticut. His complaint in the Connecticut court alleged that he had been a resident of that state for more than three years next preceding the commencement of the action; that his wife wilfully deserted him in 1869, and had ever since continued said desertion, and had totally neglected all the duties of the marriage on her part to be performed, down to the date of the action. Service of summons on the defendant in this case was made by publication, in accordance with the laws of the state of Connecticut, the wife being absent therefrom. A decree of divorce was granted by the Connecticut court as prayed for in the complaint. No personal service was had. To the suit of the wife in the state of New York, the husband interposed as a defense the decree thus obtained in the state of Connecticut and offered it in evidence, insisting that the same was *res judicata*. The wife objected. The New York court sustained the objection, and decided the case against the husband upon the alleged ground that the Connecticut court had not obtained jurisdiction of the wife, and therefore the decree was invalid. From this judgment the husband appealed to the Supreme Court of the United States upon the ground that the decree of the Connecticut court was valid, and was entitled to recognition as such in the State of New York, under the full faith and credit clause of the constitution, heretofore quoted. The Supreme Court of the United States sustained the judgment of the New York court, thereby holding that the decree of the Connecticut court was not entitled, as of right, to full faith and credit in the state of New York, by virtue of the constitution. 201 U. S. 605-606.

The question as to whether the Connecticut decree was entitled, by virtue of the constitution, to full faith and credit in the state of New York, as respondent believed, rested solely upon the question as to whether the Connecticut court had jurisdiction to render a valid decree. To determine this it was necessary to find whether or not proper service had been made upon the defendant, and this could only be determined by ascertaining the nature of the action, whether personal or *in rem*. If the former, personal service was absolutely indispensable. If the latter, service by publication according to the law of the state of Connecticut would suffice. The court found that constructive service was not sufficient, although the plaintiff was domiciled in the state where the action was brought, and was a citizen thereof. The conclusion reached is itself indubitable proof that the court regarded the action in Connecticut as one *in personam*, and not one *in rem*. In the course of its decision the court directly or indirectly determined the following questions:

1. That a decree of divorce rendered by a state court in favor of a plaintiff domiciled in that state, against a non-resident defendant, without personal service, was not entitled to be enforced, as a matter of right, in another state, under the full faith and credit clause of the constitution. This was the main question.

2. That in order to determine whether a decree of a state court is valid and binding in other states under the constitution, it is necessary to determine whether the court rendering the decree had jurisdiction over the subject matter of the action and the person of the defendant. 201 U. S. 573.

3. That a decree rendered by a state court may be valid and binding, and have force and effect within the borders of that state, and yet not be

entitled to obligatory enforcement in other states of the Union.

4. That a state, by virtue of its inherent power over the marriage relation, as regards its own citizens, has the power to dissolve a marriage as to a citizen of such state, and that such action is binding in that state as to such citizen, and the validity of such judgment may not be questioned even on the ground that the action in such state, in dealing with i s own citizen concerning the marriage relation, was repugnant to the due process clause of the constitution. 201 U. S. 569; Maynard v. Hill, 125 U. S. 190.

5. That where the domicile of a husband is in a particular state, and that state is also the domicile of matrimony, the courts of such state having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicile, disregard an unjustifiable absence therefrom and treat the wife as having her domicile in the state of the matrimonial domi ile for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage, which will be binding upon both parties and will be entitled to recognition in all other states by virtue of the full faith and credit clause of the constitution. 201 U. S. 571-572; Atherton v. Atherton, 181 U. S. 155.

The foregoing propositions were decided by the court either directly or by approval or affirmance of former decisions by that court. It is not our intention to attempt an exhaustive argument nor write a commentary upon the law of marriage and divorce, for inasmuch as we shall, in the course of this brief discussion, arrive at the same ultimate conclusion as that reached by the petitioner, an extended argument would be a work of supererogation, and an imposition on the court; but inasmuch as the decision of the Supreme Court of the United States in the Haddock case, above referred to, is largely, if not entirely, responsible for the course pursued by the respondent, we deem it just to him, as well as a duty we owe to this court, to at least present our views as to the scope, meaning and effect of the decision, as concerns the case before us. The federal question involved in that decision was, as stated by the court itself, as follows: "Did the court below (meaning the N w York court) violate the constitution of the United States by refusing to give to the decree of divorce rendered in the state of Connecticut, the faith and credit to which it was entitled?" 201 U. S. 565, 566. If the court had limited its decision to the single question above stated, the wide-spread confusion and conflict of opinion among law writers and the legal fraternity generally, which has resulted, would not have occurred. But it did not so limit its decision. It went further and decided that while the decree might not, as of right, be entitled to full faith and credit outside of the state of Connecticut, yet it might be enforced within the borders of that state. 201 U. S. 605. In view of the constitution to which we have referred, and former decisions of the same court, this part of the decision seems to a large and respectable number of able jurists and lawyers in the country, to be unsupported by either reason or authority. It has caused many reviews and criticisms of the opinion as a whole. Be this as it may, it is the opinion of the court that is binding, and not that of its commentators, critics and reviewers. It is the opinion itself to which we must look in determining the position to be taken by this court in the case at bar. After a somewhat careful review of the opinion we do not believe the court intended to hold that all suits for divorce, where the defendant is a non-resident of the state, and the service constructive only, are personal actions, but that in order to take the cause out of that class there must be something more than the existence of a marriage relation, together with a domicile of the plaintiff in a particular state. There must be something more than these, even when coupled with a just cause of action, to confer jurisdiction upon the court to render a decree entitled to extra-territorial recognition. Just how much more than these the court would require to give to a suit for divorce the character of an action *in rem*, in which constructive service only would be sufficient to confer jurisdiction, was not definitely determined. It was determined, however, by approval of a former decision, that the elements above stated, coupled with the fact that the domicile of the plaintiff husband and the matrimonial domicile of the parties were in a particular state, was sufficient to confer jurisdiction upon the court to render a valid decree, notwithstanding the service was constructive only, and further that such decree would be valid and binding in other states by virtue of the full faith and credit clause of the constitution. 201 U. S. 571; Atherton v. Atherton, *supra*. Thus it appears the only legitimate difference between the Haddock case and the Atherton case, upon the question of jurisdictional facts, is the fact that the domicile of the plaintiff and matrimonial domicile of the parties in the Atherton case were the same, while in the Haddock case this element did not exist. We use the expression "legitimate difference" advisedly.

In determining whether or not the Connecticut court had jurisdiction, in our opinion the Supreme Court should have determined it by the record of the Connecticut court itself, and not by evidence *de hors* that record. Dissenting opinion, Haddock case, 610. That the court did not so limit itself, but resorted to facts appearing in the plaintiff's case in the New York court, and perhaps allowed such facts to influence its judgment upon the question of the Connecticut court's jurisdiction is one of the anomalies of the decision, for which it is difficult to account. 201 U. S. 572.

But we digress. As we stated above, a comparison of the jurisdictional facts in the Haddock case, as they appear in the record in the Connecticut court (p. 610) with the jurisdictional facts in the Atherton case (p. 571), discloses no fundamental difference except as above stated.

Thus far the court seems to have drawn the line of jurisdiction at matrimonial domicile. That is, without the element of matrimonial domicile in the Atherton case, the validity of the divorce in that case would have been subject to impeachment, and would have shared the same fate as did the divorce in the Haddock case. The court lays some stress on the fact that in the Atherton case it was the duty of the wife to be at the matrimonial domicile, and that for the purpose of dissolving the marriage she might be presumed to be there, and therefore within the jurisdiction of the court. 201 U. S. 571. But if the court had confined itself to the record of the Connecticut court in the Haddock case, as we insist it should have done, on the question of the Connecticut court's jurisdiction, it would have appeared that Haddock was a *bona fide* resident of Connecticut, domiciled therein; that his wife deserted and abandoned him; that she was in fault; and under such a state of facts his domicile was hers, and it was just as much her duty to be there with him as it would have been had they at some time lived and cohabited together in that state. The illogical distinction made by the court is, as before intimated, due to its unwarranted departure from the record of the Connecticut court in the ascertainment of jurisdictional facts, of which that record was the best and only legitimate evidence. But our duty in this case is perhaps to find out and present the scope and limit of the decision of the court, rather than to determine whether it was right or wrong.

It is claimed by the petitioner that the case at bar is practically "on all fours" with the Atherton case, because in this case Utah was not only the domicile of the plaintiff, but the matrimonial domicile of the parties as well. We deny that the cases are analogous. In the Atherton case the husband was plaintiff, domiciled in Kentucky, which was also the matrimonial domicile of the parties. By virtue of this condition of affairs, he being the husband, and blameless and entirely free from fault, and his wife being guilty of violating her matrimonial obligations, as appears by the record, her duty was to be with him, and by a fiction of law she was presumed to be in Kentucky, where the suit was instituted for the purpose of dissolving the marriage. The same rule does not apply in the case of a wife, under any rule or law with which we are familiar. The conduct of the husband may be such as to justify the wife in establishing a domicile separate from his, but we know of no law which makes her domicile the criterion by which his domicile is to be determined, no matter what his conduct may be, or how just may be her cause of action against him. Hence we cannot agree that the case at bar should be determined by the rule laid down in the Atherton case. We believe, however, that the respondent has jurisdiction to render a decree in the case made before him by the petitioner. We believe it not because of any rule laid down by the supreme court in the opinion referred to, or any opinion it has ever rendered, but because of the great and overwhelming preponderance of judicial opinion in courts of the United States the respondent had jurisdiction to grant the relief prayed for by the petitioner. Vol. 2, Sec. 152, Bishop on Marriage and Divorce, and cases cited. See also cases and states cited in minority opinion, Haddock v. Haddock, *supra*, 624.

There is nothing in the decision in the Haddock case, when thoroughly understood, conflicting with the opinion herein expressed, that the respondent had jurisdiction of the petitioner's case, and power to hear and determine the same. Indeed, that decision is authority for the proposition that the fundamental rules for acquiring jurisdiction by a state court in ordinary cases do not necessarily apply in actions for divorce; that a state court, without jurisdiction of the defendant in a divorce case, sufficient to entitle its judgment to recognition in other states, still has power to enforce such judgment within the borders of the state where the same is rendered, and that any defect of jurisdiction in such a case, so long as the court proceeds according to the laws of such state, does not invalidate the judgment therein, and the validity of such judgment may not be questioned in such state on the ground of repugnance to the due process clause of the constitution. 201 U. S. 569. This, the court admits, is an exception to the general rule, and is a consequence of the inherent power which all governments possess over the marriage relation, its formation and dissolution, as regards their own citizens. 201 U. S. 569. So that, as far as the opinion under review is concerned, instead of limiting or curtailing the power of courts to grant divorces in cases of questionable jurisdiction, it opens the door wider than ever before, as far as concerns the validity of divorces within the state where the judgment is rendered. The idea that one party to a marriage may be divorced, and not the other, and that, too, on the ground that the court has jurisdiction of the one and not of the other, if not entirely original, is at least a judicial wonder. It suggests to the mind situations and problems perplexing, intricate, and almost unbelievable.

As to the wife in New York the Connecticut court was without jurisdiction, therefore the husband was divorced but she was not. The question arises, would not the divorce of Haddock, valid in the state of Connecticut, be valid in every other state except New York? If not, why not? Would not the divorce of Haddock, valid in Connecticut, be valid even in the state of New York for all purposes except as against the wife in New York? Again we ask, if not, why not? Illustrative of the first question, suppose Haddock, after he was divorced in Connecticut, had taken a wife in the state of Vermont, would he have been guilty of bigamy? Or, suppose after marrying in Vermont he had acquired property in that state, would not the Vermont wife be entitled to a wife's interest, according to the laws of the state? We may even go further. Suppose, after being divorced, Had-

dock had married again, even in the state of New York. Would he there be guilty of bigamy, under the holding of the supreme court in the Haddock case? The last question the casual reader would perhaps unhesitatingly answer in the affirmative, assuming that that question is, in effect, determined by the decision of the supreme court. To our minds, however, the proposition is not entirely free from doubt. The court having held that the divorce of Haddock was valid in Connecticut, and was only invalid as against his wife in New York, is not that the very limit of the court's decision? Is it not true, then, that except in some proceeding involving the marriage relation, in which the wife is a party, the Haddock divorce should be held valid in every state in the Union, under the almost universal rule of interstate or international law, that a marriage, valid according to the laws of the state where solemnized, is valid everywhere? These thoughts suggest to us that perhaps some of our statements in the foregoing discussion are broader than we intended, especially the statements wherein we have assumed, directly or indirectly, that the decision of the supreme court holds the Haddock divorce invalid, or not entitled to full faith and credit, in any state except the state of Connecticut. To be accurate in the expression of our views, we are of the opinion that there is nothing in the decision of the supreme court in the Haddock case to warrant the idea that the court holds the Haddock divorce not entitled to full faith and credit in any particular state except in some proceeding wherein the New York wife is a party. The state of New York is possibly an exception, but as to every other state we are satisfied our position is correct.

These suggestions are perhaps apart from the question before the court, but they are full of interest, and in all probability in the years to come will furnish the legal fraternity and courts of the land with abundant matter for serious disputation. The proposition that a judgment or decree rendered in one state, enforceable therein, is entitled to full faith and credit in any other state, until this decision was rendered had almost become axiomatic in the jurisprudence of the country. Christmas v. Russell, 5 Wall. 290, 302; Marshall, C. J., in Hampton v. McConnel, 3 Wheat. 234; Mills v. Duryee, 7 Cranch. 481, 485; Story's Constitutions, Sec. 1313; Hancock National Bank v. Farnham, 176 U. S. 640; Cheever v. Wilson, 9 Wall. 108; D'Arcy v. Howard, 11 How. 165. But this proposition is not controlling in the case at bar. It is enough for our purpose that the decision in the Haddock case does not in any way limit the power of the court in the present case, to render judgment in accordance with the facts found by the court. The state is to be congratulated that such is the case. To say that a sovereign state of this Union has not the power, by its judicial arm to grant relief to one of its own citizens, domiciled within its borders, in a cause of action for divorce, admitted to be just, may well make us pause. It is a familiar maxim, "Where ever there is a wrong there is a remedy." But if relief be denied in a case like this, then the maxim become a paradoxical illusion, and is without force or effect. We believe, while attributing to the respondent the utmost good faith, and commending him for his prudence in the course pursued, he should be required to render decree in the case in question, and award the plaintiff the relief to which she is entitled. As to what the policy of this state should be respecting the faith and credit that should be given to judgments and decrees similar to this, rendered by courts in other states, we consider that to be a question that does not fairly arise upon the record before the court. The supreme court, in the Haddock case, seems to regard it as a question that each state must solve for itself. The underlying principle being that each state has absolute jurisdiction over the marriage relation of its own citizens within the boundaries of the state, and can dissolve such relations within such state, leaving to other states the same absolute jurisdiction over the marriage relations of its citizens within the state unaffected by any judgment that may be rendered by the court of another state. Whenever a case arises in the state of Utah, in which a decree of divorce rendered by the court of another state is relied upon as a bar or *res judicata*, it will then be time to declare and make known the policy of this state, in conformity with our own ideas of law and justice.

As we are of opinion, the decision of the supreme court in the Haddock case, with its doubtful meaning and perplexing problems, was the sole cause of respondent's reluctance to exercise jurisdiction without the opinion of this court, we have deemed it unnecessary to extend this discussion beyond a review of the decision itself.

NOTE.—*Validity of Constructive Service on Non-resident Divorce Defendants.*—A deep consideration of the opinion of the United States Supreme Court in the case of Haddock v. Haddock will show that the policy it proposes is along the line of the thought of our best citizens. Our divorce laws have become a scandal the world over, and though at first blush the opinion of the Supreme Court of the United States may seem harsh, yet it was a question of a departure from well settled principles which not only pertained to divorce cases, but to proceedings involving the same principles. A divorce suit is nothing more nor less than a proceeding in equity to rescind a contract. It is not necessary to say more to show the bearing the opinion in the principal case has upon all contracts.

It is a most creditable thing that our United States Supreme Court has had the back bone which has been displayed in Haddock v. Haddock, and while we are aware that the position we occupy in upholding the position of the court is not the popular one, it is just as much the part of a law journal to express its mature views of the opinions of the courts fearlessly, when they are given, as it is the part of the court to render carefully considered opinions. We were at first inclined to the popular view, but when the whole matter is carefully considered, it will be seen that time will give credit to this opinion now so generally con-

demned. It was infinitely more important for the Supreme Court of the United States to sustain deeply rooted fundamental principles of government than to uphold bad ones which would tend to a laxity in the administration of the laws. It was better to let the states, by legislative enactments, secure the parties affected by the decisions than that the due administration of principles to which ages have given credit, should be broken down. The Supreme Court of the United States will not hesitate to sustain the necessary legislation which humanity might demand on the ground of public policy. Then, must it not appeal to every lawyer that it is better for the Supreme Court of the United States to uphold a principle which is well established in the wisdom of the ages and which must result in giving greater sanctity to the marriage bonds, than to have pursued the other course. Every collocation of words must be expanded or contracted by fundamental law. Therefore, the full faith and credit clause of the federal constitution must be construed to harmonize with other fundamental laws. The law of God, the law of reason and the law of man must accord to every one his day in court or an opportunity to be heard. Hughes' Procedure, 51–77, *Audi Alteram Partem*, and cases cited and discussed, amongst which is Windsor v. McVeigh, 93 U. S. 274. Consistently with this maxim and this case, well might the New York court say: "This citizen of ours, here all the time within our jurisdiction, has never appeared in a foreign jurisdiction, which could serve no process in our state that could drag her thence and force her abroad, perhaps beyond the seas, to defend and abide judicial results. Now, therefore, unless she appeared in the foreign court, its decree against her is *brutem fulmen*. Now, if the decree in a foreign jurisdiction attempts to sweep away all her rights she may here be heard as to the justness of such a decree. If such a decree does not show that she was personally served, or appeared in person or by attorney to defend, then it is a *coram non judice* proceeding, binding no person or thing." The above conclusion is consistent with Pennoyer v. Neff, 95 U. S. 714; Windsor v. McVeigh, *supra*, also the fundamental maxims of administering the law of the land. The language of constitutions and statutes must ever be modified by the requirement of fundamental law, which, as Judge Story said, are the making of government. These always have been and ever must be silent factors imported by construction. *Concord, sen legibus est optimus interpretandi modus*; to make laws agree with laws is the best mode of interpreting them.

JETSAM AND FLOTSAM.

THE ATTACK ON THE SECOND-CLASS MAILING PRIVILEGE—FIRST MEETING OF CONGRESSIONAL COMMISSION.

A proposal which threatens the existence of the thousands of prosperous weekly newspapers scattered all over the United States, and intimately concerns the publishers of every kind of periodical, has been made to the Postal Commission recently authorized by Congress to investigate the working of the second-class mail regulations under which all such literature is handled by the post office. It is nothing less than a suggestion to increase fourfold the charges for carrying newspapers and magazines to the reading public. It is actually now under consideration.

Testifying before the commission on behalf of the post office department at its hearings last week in New York, Third Assistant Postmaster-General Madden recommended as a means of ending controversies as to what should and what should not be entitled to admission to the mails at the second-class rate, increasing the rate from one cent a pound to four, and including in the second-class all printed matter without distinction. Newspapers, magazines, advertising circulars—catalogues of business houses—should all be put on the same basis, said Mr. Madden, then the post office department would not have to distinguish between them, and the carriage of second-class mail would be only less profitable than the carriage of letters. These were Mr. Madden's words:

"In the postal service it should not be necessary to inquire, in order to establish postal rates, whether that (indicating a weekly newspaper) is public or private. The sole question should be, is it printed matter? and the rate of postage should be so fixed that it would take printed matter irrespective of whether there were subscribers, or it was issued for advertising purposes, or anything else. Let that be handled by the publishers. I would place the rate on all printed matter at about four cents a pound. I would ask no questions save as to whether it is printed matter."

He went on to say that anyway if newspapers and periodicals were to retain the "privilege" of being carried in the mails at the present rate of a cent a pound, a limit should be set on the amount of matter te be put into any single issue and on the amount of advertising it should contain. Then any postmaster would be able to determine with a tape line when the publication came into his office, if it met the department's conditions, and it would not be necessary to submit the matter to Washington.

Newspapers and periodicals, when mailed by the publishing office, are now carried in bulk and distributed to subscribers as second-class mail at a cent a pound. Circulars, catalogues and such matter are third-class mail at eight cents a pound. Fourth-class mail consists of merchandise and costs sixteen cents a pound. The result of the adoption of Mr. Madden's suggestion would be that advertising matter sent out solely with the idea of increasing trade would be carried at half its present rate, while the rate on newspaper and magazine distribution would be quadrupled. This would mean that the publishers of the best class of periodical literature in the country would either have to raise the prices to their subscribers or go out of business. Hundreds of them undoubtedly would go under because all possible margin of profit to the publisher under such conditions would be wiped out. On the other hand, the flood of stock quotation lists, advertising circulars and similar stuff would be practically endless. The suggestion is ridiculous.

The situation which has brought forth this remarkable proposal arises from two causes: owing partly to the increased size and circulation of periodicals in the last few years and partly to the tendency of some commercial concerns to advertise their wares in illustrated booklets and imitation newspapers which wrongfully often get into the second-class mail, the post office department is constantly complaining that its second-class matter is handled at a loss. The first-class mail traffic, however, is immensely profitable. In fact, the loss in second-class mail is almost off-set by the profit on first class, and if the post office did not carry free all the mail for all branches of the government, th

department, aside from the recently established rural free delivery service, would be practically self-sustaining. As it is, the appropriation for the annual post office deficit is really an indirect payment of the government's postage bill.

But the real reason for the desire of the post office department to change the present regulations is the great trouble it has to settle, what is and what is not entitled to be carried as second-class mail. The law provides that newspapers and periodicals issued from a known office of publication; published for the dissemination of information of a public nature, or in the interests of literature, science, art or some special industry; having a legitimate list of subscribers and not being distributed principally for advertising purposes or for free circulation at nominal rates, shall be handled by the post office department as second-class mail. But it is difficult to decide what publications really fulfill the letter of the law. There have been numberless rulings by successive postmaster-generals on disputed points, many of them wholly contradictory. The post office now wants a new statute. Hence the appointment of this commission of inquiry. The commission is composed of Senators Penrose, Carter and Clay, and Representatives Overstreet, Gardner and Moon. Its duty is set forth as being to inquire "whether the revenue from the second-class of mail matter should not be made commensurate with the actual cost of the service rendered in handling it, and whether its classification should not accordingly be grounded upon practical rather than ideal distinction."

The commission has just finished a week's hearing in New York at which it has taken several thousand pages of testimony. Except for that of a few postal officials, this testimony has been unanimous that the present rate is adequate, just and of benefit to the whole people. To change it as proposed, would not only put out of business half the publications in the country, but would evoke a storm which would be felt from end to end of the United States as soon as the reading public began to realize the consequences.

BOOK REVIEWS.

CYCLOPEDIA OF LAW AND PROCEDURE, VOL. 22.

Another volume of this very valuable encyclopedia is now at hand, maintaining, if not increasing its already great reputation for accuracy and accessibility as a legal encyclopedia. The following subjects are treated in this volume: Improvements, by Henry H. Skyles, 42 pages; Incest, by William E. Higgins, 36 pages; Indemnity, by Arthur A. Stearns, 30 pages; Indians, by Lincoln B. Smith, 48 pages; Indictments and Informations, by Wm. Lawrence Clark, 345 pages; Infants, by Joseph W. Mayrath, 213 pages; Informations in Civil Cases, by Henry H. Skyles, 8 pages; Injunctions, by Henry Wade Rogers, 344 pages; Innkeepers, by Joseph H. Beale, Jr., 36 pages; Insane Persons, by Henry F. Buswell, 145 pages; Insolvency, by Edwin C. Brandenburg, 114 pages; Inspection, by Edward C. Ellsbree, 17 pages; Insurance, by Hon. Emlin McClain, 71 pages; Insurrection, by George B. Davis, 8 pages; Interest, by John W. Daniel, 133 pages; Internal Revenue, by J. B. T. Tupper, 105 pages; International Law, by Hon. David J. Brewer, 61 pages. It would be hard to find any previous volume so crowded as this volume is with such important subjects of law and such a brilliant galaxy of contributors. Such articles as are contained in this volume are what have given the Cyc. its high standing and superior excellence over all similar works.

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BOOKS RECEIVED.

Cyclopedia of Law and Procedure. William Mack, Editor-in-Chief. New York, The American Law Book Company, 1906.

HUMOR OF THE LAW.

An amusing occurrence took place in Conconully, Okanogan county, Wash., a short time ago during the term of the superior court. An alien appeared before the court asking for citizenship papers. When asked by Judge Steiner where he was born, he replied that his birthplace was in Missouri. Thinking he might have misunderstood the man the judge asked the question again and received the same reply, and a ripple of laughter went over the court room. Investigation proved the truth of the assertion. He had been born in Missouri, but a few years ago had taken out naturalization papers in Canada, and was now seeking to again become a citizen of his native country.

The late Lieut. John P. Bradstreet of the 50th Massachusetts, was for many years a deputy sheriff and turnkey under High Sheriff Herrick at the Lawrence house of correction. All the newcomers were by him assigned to their proper quarters.

One day, upon the arrival of a new squad of inmates, there was one who seemed somewhat more "tony" than the rest, and calling the lieutenant aside, he claimed a little more consideration than the others owing to his previous standing in society.

"I never was in such a situation before," said he, "and I trust you will give me a little different quarters than those other fellows. I am highly educated, and can speak seven different languages."

"Seven?" remarked the lieutenant. "That's altogether too many. We don't have but one language here, and little o' that."

Curan was once arguing in chancery before Lord Clare, who was seated on the bench caressing a Newfoundland dog, and apparently ignoring Curran's presence. At last Curran stopped speaking. The judge said: "Go on, Mr. Curran."

Curran replied: "I beg a thousand pardons; I thought your lordship was employed in consultation." —*Green Bag.*

A small colored boy was arraigned for some trivial offense, and after all had been heard the judge suggested to the grandfather, with whom the boy lived, that perhaps a little more careful oversight might be beneficial, whereupon the grandfather, who was an extremely respectable African, very tall and of great dignity, looked down on the judge in a pitying manner, but with the utmost respect, said:

"Well, judge, how do you suppose you would feel if you were the parent of a little nigger young one?"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCIDENT INSURANCE—Injury to Hand from Voluntarily Striking Another.—The death of an insured in an accident policy resulting from an injury to his hand from voluntarily striking another person in the face held not to have been the result of "accidental" means within the meaning of the policy.—Fidelity & Casualty Co. of New York v. Stacey's Ex'rs, U. S. C. C. of App., Fourth Circuit, 143 Fed. Rep. 271.

2. ACTION—Misjoinder of Causes.—Certain complaint held to state but a single cause of action for breach of contract and not to join with such cause of action a claim for conversion.—Savage v. Salem Mills Co., Oreg., 85 Pac. Rep. 69.

3. ACTION—Procedure.—Where the subject-matter involved in a judicial or *quasi* judicial proceeding is status, the proceedings requisite to a determination are the same as where the subject-matter is of a tangible character.—State v. Chittenden, Wis., 107 N. W. Rep. 500.

4. APPEAL AND ERROR—Bill of Exceptions.—Failure of a trial judge to deny or answer an allegation of a petition for *mandamus* that he had refused to try petitioner's divorce case because of the insanity of the defendant held to constitute an admission of such allegation. — State v. Murphy, Nev., 85 Pac. Rep. 1004.

5. APPEAL AND ERROR—Discretion of Trial Court.—Permitting withdrawal of original bill of waterworks company, alleging that it was the owner of a contract involved in a suit between a municipality and another waterworks company, held not an abuse of the discretion of the trial court.—City of Vicksburg v. Vicksburg Waterworks Co., U. S. S. C., 26 Sup. Ct. Rep. 660.

6. APPEAL AND ERROR—Findings of Court.—On appeal from a judgment in an action to determine adverse interests in mineral lands, certain facts covered by implied findings held to be regarded as established.—Southern California Ry. Co. v. O'Donnell, Cal., 85 Pac. Rep. 932.

7. APPEAL AND ERROR—Law of Case.—A decision on appeal, in the absence of any material change in the issues or testimony, must be regarded as the law of the case on a subsequent appeal.—Vohs v. Shorthill & Co., Iowa, 107 N. W. Rep. 417.

8. APPEAL AND ERROR—Liability of Surety on Waste Bond —A surety on a waste bond given to supersede an order of confirmation of sale in foreclosure held not liable for taxes assessed against the property pending confirmation in the supreme court.—United States Fidelity & Guaranty Co. v. Rieck, Neb., 107 N. W. Rep. 889.

9. ATTACHMENT—Nonresidence.—Where ground of attachment is that defendant is a nonresident, he is not entitled to make a special appearance or to attack the jurisdiction on the ground that he is not the owner of the property seized.—Kneeland v. Weigley, Neb., 107 N. W. Rep. 574.

10. APPEARANCE — Offer to Confess Judgment — A written offer to confess judgment held a general appearance, giving jurisdiction over the person of the defendant.—Maryland Casualty Co. v. Bank of Murdock, Neb., 107 N. W. Rep. 562.

11. APPEAL AND ERROR—Order Granting Preliminary Injunction.—An interlocutory order granting a preliminary injunction will not be reversed on appeal unless it appears from the record that the injunction was improvidently granted.—Hammond Elevator Co. v. Board of Trade of City of Chicago, U. S. C. C. of App., Seventh Circuit, 143 Fed. Rep. 292.

12. APPEAL AND ERROR—Party Aggrieved. — Where plaintiff was induced to purchase land from an administrator by false representations, plaintiff was aggrieved by an order of the county court confirming the sale, and was entitled to appeal therefrom —Greiling v. McLean's Estate, Wis., 107 N. W. Rep. 389.

13. APPEAL AND ERROR—Supersedeas Bond.—In the absence of fraud or mistake, a surety on a supersedeas bond can be held only for consequences of the proceeding in which the instrument was given. — American Bonding Co. v. Heye, Neb., 107 N. W. Rep. 591.

14. ARREST—Civil Action for Malicious Prosecution.—Order of arrest in action for malicious prosecution set aside for failure of affidavit to state facts establishing malice and absence of probable cause.—Diad v. Shibley, 99 N. Y. Supp. 188.

15. ATTACHMENT—Funds of Decedent's Estate.—Funds of an estate in the hands of an administrator are not funds in court, although there is a suit pending to settle the estate, and hence the service of an attachment upon the clerk creates no lien on the fund. — Sanders & Walker v. Herndon, Ky., 93 S. W. Rep. 14.

16. BANKRUPTCY—Claims Released by Discharge.—A bankrupt held entitled to discharge, on writ of *habeas corpus* from arrest under a capias in an action to recover the value of property alleged to have been embezzled by him where no facts are pleaded showing the embezzlement to have been committed while he was acting in a fiduciary capacity, so as to prevent a discharge from releasing the debt.—Barrett v. Prince, U. S. C. C. of App., Seventh Circuit, 143 Fed. Rep. 302.

17. BANKRUPTCY—Conveyance with Intent to Hinder and Delay Creditors.—A conveyance by an insolvent of all of his nonexempt property in trust for the benefit of his creditors, although without preferences, is one made with intent to hinder and delay his creditors, since that is its necessary effect, and constitutes an act of bankruptcy.—*In re* Salmon & Salmon, U. S. D. C., W. D. Mo., 143 Fed. Rep. 395.

18. BANKRUPTCY—Declarations of Grantor.—In an action to set aside an alleged fraudulent conveyance by a bankrupt made six months before the filing of his petition, evidence that his reason for going into bankruptcy was a threatened attachment held inadmissible.—Maffi v. Stephens, Tex., 93 S. W. Rep. 158.

19. BANKRUPTCY—Discharge.—Under Bankr. Act, ch. 541, § 14, it is the duty of the court to grant a bankrupt his discharge, unless his commission of one of the offenses therein specified is established by due proof, the burden of proof resting on the objector.—*In re* Eades, U. S. C. C. of App., Seventh Circuit, 143 Fed. Rep. 293.

20. BANKRUPTCY—Effect of Discharge.—Suit to set aside fraudulent conveyance held not barred by discharge in bankruptcy.—Bunch v. Smith, Tenn., 93 S. W. Rep. 80.

21. BANKRUPTCY—Fraudulent Purchase of Goods by Bankrupt.—One from whom a bankrupt obtained goods by fraudulent representations has his election to confirm or repudiate the sale, but having made such election, with knowledge of the facts, by proving his claim and voting as a creditor in the bankruptcy proceedings, he is concluded thereby, and cannot afterwards withdraw his claim and recover the goods. — Standard Varnish Works v. Haydock, U. C. C. C. of App., Sixth Circuit, 142 Fed. Rep. 318.

22. BANKRUPTCY — Homestead Exemptions. — Under the homestead statute of Kentucky (Ky. St. 1903, § 1702 *et seq.*), a bankrupt is not entitled to a homestead exemption in land the title to which is in his wife for life with remainder to him, although it is occupied as a home by both with their children.—*In re* Sale, U. S. C. C. of App., Sixth Circuit, 143 Fed. Rep. 310.

23. BANKRUPTCY—Preferences.—Upon an issue as to the solvency or insolvency of a bankrupt at the time he gave a mortgage to a creditor, claimed to be voidable as a preference, his property should be estimated at its value in its then condition as a going concern, and not at its decreased value after bankruptcy.—J. W. Butler Paper Co. v. Goembel, U. S. C. C. of App., Seventh Circuit, 143 Fed. Rep. 295.

24. BANKRUPTCY—Special Findings —Findings of facts by a special master in a bankruptcy proceeding will not be set aside if there is any substantial testimony to sustain them, and it does not appear that they are influenced by any mistaken conclusions of law.—*In re* Harris, U. S. D. C., E. D. Mo., 143 Fed. Rep. 421.

25. BANKRUPTCY—Unliquidated Demands.—Where an agreement indemnifying a contractor's surety assigned to the latter all the former's plant more than four months before the contractor became a bankrupt, the surety's claim was the amount of its loss in completing the contract with such plant.— Wood v. United States Fidelity & Guaranty Co., U. S. D. C., D. Mass., 143 Fed. Rep. 424.

26. BANKRUPTCY—Voidable Preference.—A bill of sale for a steam launch, made by a bankrupt to a creditor more than a year prior to his bankruptcy, but which was not recorded until within four months prior, held not to take effect until the date of its record, under Code Va. 1904, § 2465, and to constitute a voidable preference. —*In re* Montague, U. S. D. C., E. D. Va., 143 Fed. Rep. 428.

27. BANKS AND BANKING—Validity of Certified Check.— Where agent of bank certifies check which he issues, person receiving check held bound to make inquiry from the bank as to its validity.—State v. Miller, Oreg., 85 Pac. Rep. 81.

28. BILLS AND NOTES—Consideration.—Where a note is made payable to a certain person, and there is nothing to indicate that any other person has any interest therein, the presumption will be that the note is for the personal benefit of the payee named.—McGuffin v. Coyle & Guss, Okla., 85 Pac. Rep 954.

29. BRIBERY—Solicitation. —Under Laws 1901, p. 38, ch. 34, the solicitation by a public officer of a bribe held an offense, though payment of the bribe is refused.— Rudolph v. State, Wis., 107 N. W. Rep. 466.

30. BROKERS—Authority.—Where letters passing between the owner of land and a broker contain data from which a description of land placed with the agent for sale can be ascertained, the contract is valid and enforceable.—Holliday v. McWilliams, Neb., 107 N. W. Rep. 578.

31. BROKERS—Compensation.—Duty of a broker undertaking to find a purchaser at a price fixed or at a price satisfactory to the seller, is performed when the buyer and seller are brought together.—Johnson v. Hayward, Neb., 107 N. W. Rep. 884.

32. BROKERS — Construction of Contract.—Immediate notice required by a contract means notice within a reasonable time, taking into consideration the situation of the parties and all the surrounding circumstances.— Tuffree v. Binford, Iowa, 107 N. W. Rep. 425.

33. CHAMPERTY AND MAINTENANCE — Grants of Land Held Adversely.—The conveyance by a widow of her dower right in the lands of her deceased husband while the lands are in the adverse possession of another is contrary to the statute of the state against champerty, and void.—Bridgewater v. Byassee, Ky., 93 S. W. Rep. 35.

34. COLLISION—Vessels at Wharf.—A barge and a canal boat, left over night on opposite sides of a narrow stream while discharging, and within two or three feet of each other, both held in fault for an injury to the barge caused by their sagging together when the tide receded.—The W. C. Kirk, U. S. D. C., D. N. J., 143 Fed. Rep. 358.

35. CONSPIRACY—Agreement Between Theater Managers to Exclude Critic. — Agreement among theatrical managers to exclude certain individual from their respective establishments held an unlawful conspiracy.— People v. Flynn, 99 N. Y. Supp. 198.

36. CONSTITUTIONAL LAW—Equal Protection.—Liquor sellers are not denied protection of the laws because purchasers of domestic wines are exempted by Rev. Civ. St. Tex., 1895, art. 5060i, while such wines are in their hands, from bond and tax required by articles regulating sale of liquors.—Cox v. State of Texas, U. S. S. C., 26 Sup. Ct. Rep. 671.

37. CONSTITUTIONAL LAW—Police Power.—There is no such thing as a police power which is above the constitution or which justifies any violation of express constitutional prohibitions or manifest implied ones.—State v. Chittenden, Wis., 107 N. W. Rep. 500.

38. CONSTITUTIONAL LAW—Limitation on Federal Power. —Powers of federal government were not exceeded by Rev. St. U. S., § 1782 [U. S. Comp. St. 1901, p. 1212], making it a misdemeanor for a United States senator to receive compensation for services before any department in any proceeding in which United States is interested. —Burton v. United States, U. S. S. C., 26 Sup. Ct. Rep. 688.

39. CONSTITUTIONAL LAW—Regulations of Municipality.—Laws 1895, p. 113, ch. 8, §§ 291, 293, making an owner of premises liable for water and light furnished by a city to a tenant, are not unconstitutional as a taking of property without due process of law, or causing one person to pay the debts of another.—City of East Grand Forks v. Luck, Minn., 107 N. W. Rep. 893.

40. CONTRACTS—Mode of Compensation.—Where one has an option to pay a debt in money or by the conveyance of property, and deprives himself of the power to make the conveyance, his obligation to pay cash becomes absolute.—Irving v. Bond, Neb., 107 N. W. Rep. 585.

41. CONTRACTS—Restraint of Trade.—A contract by the vendor of a livery business not to engage in a similar business in the same village while the vendees conduct the business held not invalid as an unreasonable restraint on the pursuit of an occupation.—Cottington v. Swan, Wis., 107 N. W. Rep. 886.

42. CORPORATIONS—Authority of Agent.—The managing agent of a mining corporation has no implied power to pledge the credit of his principal by drawing and cashing bills of exchange.—Bank of Commerce v. Baird Min. Co., N. M., 85 Pac. Rep. 970.

43. CORPORATIONS—Estoppel.—A corporate grantor held not estopped to enforce a condition subsequent in a deed by a mere *ex parte* statement of its president, without action on the part of its directors.—Lewiston Water & Power Co. v. Brown, Wash., 85 Pac. Rep 47.

44. CORPORATIONS—Mortgage Trustee.—A trustee in a corporation mortgage held not liable to bondholders for breach of trust.—Black v. Wiedersheim, U. S. C. C., E. D. Pa., 143 Fed. Rep. 359

45. COURTS—Certiorari.—The constitutional grant of appellate jurisdiction given to circuit courts does not include authority to review the proceedings of an inferior tribunal on the merits by the use of a writ of *certiorari*. —State v. Chittenden, Wis., 107 N. W. Rep. 500.

46. COURTS—Porto Rico District Court.—Jurisdiction of District Court of the United States for district of Porto Rico, which under Act March 2, 1901, ch. 812, § 3, 31 Stat. 953, embraces controversies where the parties or either of them are citizens of the United States or citizens of a foreign state, extends to a cause in which both parties are subjects of the king of Spain.—Ortega v. Lara, U. S. S. C., 26 Sup. Ct. Rep. 707.

47. CRIMINAL TRIAL—Former Jeopardy.—An acquittal of having received compensation, forbidden by Rev. St.

U. S., § 1782 [U. S. Comp. St. 1901, p. 1212], from a specified person as an officer of a corporation, will not sustain a plea in bar of a prosecution for having received such compensation from the corporation.—Burton v. United States, U. S. S. C., 26 Sup. Ct. Rep. 688.

48. CRIMINAL TRIAL—Harmless Error.—On prosecution for attempt to murder P, his testimony as to the length of time he was under the doctor's care from the wound received was not harmful.—State v. Weisanburger, Wash., 85 Pac. Rep. 20.

49. CRIMINAL TRIAL—Power of Court to Grant New Trial.—The trial court has inherent power in a criminal case to grant a new trial if defendant has been deprived of his constitutional right to a fair trial.—People v. Mullen, 99 N. Y. Supp. 227.

50. DAMAGES—Defective Appliances.—In an action for injuries to a miner, a verdict for $10,000 held not so excessive as to require reversal on appeal.—Davis v. Holy Terror Min. Co., S. Dak., 107 N. W. Rep. 374.

51. DAMAGES—Wife's Torts.—A husband is liable for exemplary as well as actual damages for slanderous words uttered by the wife.—Patterson & Wallace v. Frazer, Tex., 93 S. W. Rep. 146.

52. DEEDS—Evidence.—The law presumes that no delivery has been made of deeds found among the private papers of a grantor after his death.—Shetler v. Stewart, Iowa, 107 N. W. Rep. 310.

53. DEPOSITIONS—Questions as to Competency of Evidence.—It is not the duty of an auxiliary court or judge, within whose jurisdiction testimony is being taken in suit in the court of another district, to consider the competency, materiality, or relevancy of the evidence which party seeks to elicit.—Dowagiac Mfg. Co. v. Lochren, U. S. C. C. of App., Eighth Circuit, 143 Fed. Rep. 211.

54. DESCENT AND DISTRIBUTION—Cause of Action for Trespass.—A cause of action for trespass or injury to land accruing after the death of the former owner passes to the heir or devisee, and not to the executor or administrator.—Adams v. Slattery, Colo., 85 Pac. Rep. 87.

55. EMINENT DOMAIN — Measure of Compensation. — Where street was taken for elevated railroad, award to abutting owners of the difference in the value of their property less consequental damages held proper —*In re* Brooklyn Union Elevated R. Co., 99 N. Y. Supp. 222.

56. EMINENT DOMAIN—Purpose in Part Private.—Where the purposes stated in a petition for the condemnation of land are in part public and in part private, the right to proceed must be denied.—Minnesota Canal & Power Co. v. Koochiching Co., Minn., 107 N. W. Rep. 405.

57. EQUITY—Supplemental Bill.—A complainant held entitled to maintain a supplemental bill to enforce rights growing out of an agreement of compromise made in the cause, which had the effect of a consent decree, but by the terms of which the cause was continued for certain purposes.—Chapman v. Yellow Poplar Lumber Co., U. S. C. C. of App., Fourth Circuit, 143 Fed. Rep. 201.

58. EVIDENCE — Burden of Proof.—Where there are two reasonably probable theories to account for an injury, the burden is on the plantiff to prove by some credible evidence that one which establishes defendant's liability.—Peat v. Chicago, M. & St. P. Ry. Co., Wis., 107 N. W. Rep. 355.

59. EVIDENCE—Hearing Before Master.—It is the duty of a master in taking testimony in a suit in equity to take and transmit to the court all the evidence offered, although in making his findings he may disregard such as he deems inadmissible.—Huttig Sash & Door Co. v. Fuelle, U. S. C. C., E. D. Mo., 143 Fed. Rep. 363.

60. EVIDENCE—Newly Discovered Evidence — Leave should not be granted to file a bill of review to introduce evidence which is not newly discovered, but the materiality of which was not discovered until after the hearing. —Lafferty Mfg. Co. v. Acme Ry., Signal & Mfg. Co., U. S. C. C. of App., Seventh Circuit, 143 Fed. Rep. 321.

61. EXECUTION—Enforcement.—Injunction will issue to restrain the sheriff from selling personal property where plaintiff has no adequate remedy at law, or defendant is insolvent.—Kester v. Schuidt, Idaho, 85 Pac. Rep. 974.

62. EXECUTORS AND ADMINISTRATORS—Accounting.—Proof that an administrator has converted to his own use a certain sum from the assets of the estate, in the absence of an accounting, creates no presumption that he has not converted a greater sum.—*In re* McCauley's Estate, 99 N. Y. Supp. 239.

63. EXECUTORS AND ADMINISTRATORS—Flowers as Funeral Expenses.—A widow as administratrix of her deceased husband held not entitled to credit as an administratrix for a sum paid for flowers for the grave of deceased. *In re* Schroeder, 99 N. Y. Supp. 176.

64. FEDERAL COURTS—Riparian Rights as a Federal Question.—Extent of riparian rights and rights in waters of certian patentees from United States whose titles were derived from Spain and Mexico under grants confirmed by land commissioners under Act Cong. March 3, 1851, ch. 41, 9 Stat. 631, held not federal questions.—Devine v. City of Los Angeles, U. S. S. C., 26 Sup. Ct. Rep. 652.

65. FRAUD—Evidence.—Where on the issue of fraud all the circumstances present a showing that can be reconciled with no reasonable theory of good faith, courts will hold the transaction fraudulent.—First Congregational Church v. Terry, Iowa, 107 N. W. Rep. 305.

66. FRAUDULENT CONVEYANCES — Transfer by Debtor for Benefit of Creditor.—A transfer by an insolvent debtor of all of his property to a committee of his creditors at their instance, and by them to a corporation organized to continue his business for the benefit of all creditors, held not fraudulent nor invalid as against a nonparticipating creditor.—Imperial Woolen Co. v. Longbottom, U. S. C. C. of App., Third Circuit, 143 Fed. Rep. 483.

67. HEALTH — Burial Certificates. — A city board of health regulation requiring the certificate of an attending physician as to the cause of the patient's death as a prerequisite to the issuance of a burial permit for burial in a city cemetery of a person dying in the city is not unreasonable.—Meyers v. Duddenhauser, Ky., 93 S. W. Rep. 43.

68. HOMESTEAD—Sale for Nonpayment of Taxes.—A member of a family occupying and using a homestead, who acquires a tax title, held required to hold the same as a trustee for the head of the family, in whom the homestead was vested.—First Congregational Church v. Terry, Iowa, 107 N. W. Rep. 305.

69. HOMICIDE—Corpus Delicti.—In a prosecution for homicide, the proof must show that the life of a human being has been taken, and that the death was unlawfully caused solely by accused.—State v. Barnes, Oreg., 85 Pac. Rep. 998.

70. INJUNCTION—Collateral Attack.—An order of a federal court granting a temporary injunction or refusing to dissolve it is reviewable only by appeal, and cannot be attacked in or reconsidered by the same court, in contempt proceedings for its disobedience.—Huttig Sash & Door Co. v. Fuelle, U. S. C. C., E. D. Mo., 143 Fed. Rep. 368.

71. INJUNCTION—Enjoining Stockholders' Meeting —A temporary injunction continued restraining one of the two executors of the majority stockholder of a corporation from voting the stock pending a legal controversy between the executors in which the other had been similarly enjoined; complainant being the owner of the remaining stock.—Villamil v Hirsch, U. S. C. C., S. D. N. Y., 143 Fed. Rep. 654.

72. INJUNCTION—Municipal Construction of Sewer.—A municipality cannot be required by mandatory injunction to extend a sewer and construct an outlet so as to discharge the sewage below the intake of the water works, irrespective of the exercise of the discretion in the municipality to determine the practicability of the sewer. — City of Vicksburg v. Vicksburg Waterworks Co., U. S. S. C., 26 Sup. Ct. Rep. 660.

73. INSANE PERSONS—Divorce.—Insanity of a wife held no ground for refusal to try an action against her for di-

vorce during such insanity, where the complaint alleged that the facts constituting the cause of action occurred prior to the insanity.—State v. Murphy, Nev., 85 Pac. Rep. 1004.

74. JUDGMENT—Res Judicata.—Where defendants in a suit filed an answer alleging title to the property in dispute in A and were prevented from introducing evidence, the judgment is not a bar to an action thereafter commenced by A for possession of such property, as against the plaintiff in the original suit.—Kester v. Schuldt, Idaho, 85 Pac. Rep. 974.

75. JURY—Qualification of Jurors.—In a criminal case examination of a juror held not to show that he was necessarily disqualified because of having a fixed opinion.—Leigh v. Territory, Ariz., 85 Pac. Rep. 948.

76. LANDLORD AND TENANT—Trover and Conversion.—Where, in an action for conversion of tenant's crops, the landowner offers evidence as to the damage suffered, and it is excluded on defendant's objection, the latter cannot be heard to complain that plaintiff's recovery was not based on a correct theory of the law.—Agne v. Skewis Moen Co., Minn., 107 N. W. Rep. 415.

77. LIBEL AND SLANDER—Imputing Unchastity.—Language imputing unchastity to a female is actionable *per se*.—Patterson & Wallace v. Frazer, Tex., 93 S. W. Rep. 146.

78. LIBEL AND SLANDER—Proof of Truth.—Where, on the trial of a criminal charge of libel, a part of a printed circular has been introduced in evidence, portions of which are libelous and portions not, it is not necessary for the defendant to show the truth of such portions as are not libelous.—State v. Williams, Kan., 85 Pac. Rep. 938.

79. MANDAMUS—Scope of Remedy.—While the supreme court cannot by *mandamus* control the exercise of judicial discretion, it has power to compel a committing magistrate to take some action upon a complaint presented to him tending to show the commission of a crime.—State v. Yakey, Wash., 85 Pac. Rep. 990.

80. MARRIAGE—Infancy of Party.—A marriage, where one of the parties is under the age of consent, but who is competent by the common law, is not void, but merely voidable, and, until annulled by a court of competent jurisdiction, is valid.—Willits v. Willits, Neb., 107 N. W. Rep. 379.

81. MINES AND MINERALS—Bona Fide Purchasers.—Where, in a suit to quiet title, defendant claimed an equitable interest and asked that it be conveyed to him, plaintiff was entitled to protect its legal title by invoking the doctrine of *bona fide* purchaser for value without notice.—Pheby v. Lake Superior & Arizona Min. Co., Ariz., 85 Pac. Rep. 952.

82. MASTER AND SERVANT—Negligence of Train Dispatcher.—Promulgation by train dispatcher of special orders, sufficient, if obeyed, held not a complete discharge of railroad's duty to furnish safe places for its employees, where dispatcher becomes aware of the danger of collision from disobedience of such orders, which he may guard against by new orders.—Santa Fe Pac. R. Co. v. Holmes, U. S. S. C., 26 Sup. Ct. Rep. 676.

83. MASTER AND SERVANT—Unsafe Appliances.—A vessel is not liable for the injury of a seaman through the breaking of a rope sling used in discharging cargo, due to the wear in use, where the owners furnished new rope, which might be used by the men in renewing the slings when required to render them safe.—The Fulton, U. S. D. C., N. D. Cal., 143 Fed. Rep. 591.

84. MINES AND MINERALS—Rights of Locators.—The rights of one entering upon the public domain and locating and working a mineral claim are of as high order of those of a settler.—Southern California Ry. Co. v. O'Donnell, Cal., 85 Pac. Rep. 932.

85. MONOPOLIES—Missouri Anti-Trust Statute.—The anti trust statute of Missouri (Rev. St. Mo. 1899, §§ 8965-8970) does not apply to a contract for the sale of goods to be manufactured in another state and delivered in Missouri; such contract relating to interstate commerce.—Hadley-Dean Glass Co. v. Highland Glass Co., U. S. C. C. of App., Eighth Circuit, 143 Fed. Rep. 242.

86. MORTGAGES—Contract Rights Under Municipal Ordinance.—Contract rights under municipal ordinance which were the property of a waterworks company, authorized by Laws Miss. 1882, p. 50, to borrow money, held to pass on foreclosure of mortgage of all property, franchises, privileges, and rights.—City of Vicksburg v. Vicksburg Waterworks Co., U. S. S. C., 26 Sup. Ct. Rep. 660.

87. MUNICIPAL CORPORATIONS—Power to Grant Exclusive Privileges.—A municipality contracting with parties to build and operate waterworks can exclude itself from operating waterworks of its own for the term covered by the contract.—City of Vicksburg v. Vicksburg Waterworks Co., U. S. S. C., 26 Sup. Ct. Rep. 660.

88. MUNICIPAL CORPORATIONS—Speed Regulations as to Automobile.—A city ordinance regulating the speed of automobiles held not objectionable for failure to provide for the marking of the limits of the limited speed area.—Eichmann v. Buchheit, Wis., 107 N. W. Rep. 825.

89. NAVIGABLE WATERS—Right of Railroad Company to Construct Bridge.—A court has no power to abate as a nuisance or enjoin as an obstruction to navigation a railroad bridge over a navigable stream, built and maintained in conformity to an act of congress authorizing the same, because of a renewal of its superstructure.—United States v. Parkersburg Branch R. Co., U. S. C. C. of App., Fourth Circuit, 143 Fed. Rep. 224.

90. NEGLIGENCE—Dangerous Premises.—One stacking iron building material held required to exercise ordinary care to prevent the stack from being dangerous to children playing on it.—Louisville Ry. Co. v. Esselman, Ky., 93 S. W. Rep. 59.

91. NUISANCE—Outside Stairway.—Owners of an adjoining building held entitled to object to the construction of an outside stairway, intended to be erected so as to extend into the street, which would obstruct the view of complainants' building.—McCormick v. Weaver, Mich., 107 N. W. Rep. 814.

92. PARENT AND CHILD—Emancipation.—Where a child has been completely emancipated by his parents, he, and not they, is entitled to sue for injuries to himself.—Pecos & N. T. Ry. Co. v. Blasengame, Tex., 93 S. W. Rep. 187.

93. PARTIES—Intervention.—Where certain defendants moved for leave to intervene on a motion by another defendant to amend its answer, and such motion to amend was denied, the motion to intervene will also be denied.—Muller v. City of Philadelphia, 99 N. Y. Supp. 194.

94. PATENTS—Effect of Expiration.—On the expiration of a patent for a combination, the use of such combination becomes free to the public, notwithstanding the fact that it contains as one of its elements a device covered by another patent to the same patentee which has not expired.—Thomson Houston Electric Co. v. Illinois Telephone Const. Co., U. S. C. C., N. D. Ill., 143 Fed. Rep. 534.

95. PATENTS—Suit for Infringement.—A preliminary injunction should not be granted to restrain infringement of a patent which has not been adjudicated, where the proofs leave the question of its validity in doubt, especially when it appears that defendants are financially responsible.—Bristol Oil & Gas Co. v. Beacon, U. S. C. C., N. D. W. Va., 143 Fed. Rep. 550.

96. PERJURY—Taking of Oath.—An indictment for subornation of perjury committed in connection with an application to purchase school lands held not objectionable for failure to allege that the applicant "had made a contract" for the sale or disposal of the lands.—State v. Jewett, Oreg., 85 Pac. Rep. 994.

97. PHYSICIANS AND SURGEONS—Compensation.—In an action by a physician for services rendered without any contract as to price, evidence is admissible that plaintiff was busily engaged in the practice of his profession.—Sills v. Cochems, Colo., 85 Pac. Rep. 1007.

98 PLEADING—Information and Belief.—The denial of any knowledge or information sufficient to form a belief as to a material allegation of a complaint puts the plaintiff to the proof of it.—Clark v. Apex Gold Min. Co., N. M., 85 Pac. Rep 968.

99. PUBLIC LANDS—Proceedings in Land Office.—The individual citizen has no right to complain if the federal government is willing that a land claimant's heirs retain land which the claimant obtained without strict compliance with the law and rules of the department.—Kennedy v. Dickie, Mont., 85 Pac. Rep. 982.

100. RAILROADS—Necessity of Crossing.—That an interurban electric railroad could not enter a city over its proposed route without crossing the tracks of another street railroad company held sufficient to show a necessity for such crossing.—*In re* Eastern Wisconsin Ry. & Light Co., Wis., 107 N. W. Rep. 496.

101. RAILROADS—Subscriptions in Aid —Where a contract was given to the W. & N. Ry. Co., promising to pay $250 if the railroad should be built between certain points, and the charter was amended, changing the name of the corporation to the C. N. Ry. Co., a demurrer to the evidence in an action on the contract for that reason was properly overruled.—Piper v. Choctaw Northern Townsite & Improvement Co., Okla., 85 Pac. Rep. 965.

102. RECEIVERS—Allowance of Fees from Trust Funds. —A receiver for an insolvent corporation held not entitled to an allowance of fees from a special fund arising out of securities pledged in trust to secure debenture holders and collected by the trustee.—Girard Trust Co. v. McKinley Lanning Loan & Trust Co., U. S. C. C., S. D. Ill., 143 Fed. Rep. 855

103. REMOVAL OF CAUSES—Presentation of Petition and Bond to Court.—An oral motion in a state court for the removal of a cause is a sufficient presentation to the court of the petition and bond for removal where they are on file with the clerk.—Mays v. Newlin, U. S. C. C., W. D. Va., 143 Fed. Rep. 574.

104. SALES—Conditional Sale.—A contract, nominally of lease, under which a machine was delivered to a bankrupt, construed, and held in effect a conditional sale, and the condition void for want of record as against the trustee in bankruptcy of the lessee, under Rev. St. Ohio 1905, § 4155 2.—Unitype Co. v. Long, U. S. C. C. of App., Sixth Circuit, 143 Fed. Rep. 315.

105. SALES—Delivery.—Where one purchased a bill of goods on an understanding that all or none of the goods were to be delivered, and the goods tendered lacked some of those ordered, the purchaser had a right to refuse to accept the entire bill.—Langan & Taylor Storage & Moving Co. v. Tennelly, Ky., 93 S. W. Rep. 1.

106. SALES—Delivery in Bulk.—Where a mass of logs included a lot mortgaged and a lot sold, the taking possession of the entire mass by the joint agent of the buyer and mortgagee passed title to the buyer to such of the logs as it had agreed to purchase.—Croze v. St. Mary's Canal Mineral Land Co., Mich., 107 N. W. Rep. 318.

107. SALES—Measure of Damages for Breach.—Where a contract for the manufacture of goods is repudiated by the vendee, the measure of the vendor's damage is the difference between the cost of the manufacture and delivery and the contract price.—Hadley-Dean Glass Co. v. Highland Glass Co., U. S. C. C. of App., Eighth Circuit, 143 Fed. Rep. 242.

108. SALES—Title to Property.—Under a note providing that title of the goods for which the note was given shall not pass until the note and interest are paid, the payee retains the ownership of the goods until payment.—Kester v. Schuldt, Idaho, 85 Pac. Rep. 974.

109. SALES—Warranty of Validity of Bonds.—A statement, made by a seller of municipal bonds, that they were valid, relied on by the purchaser, held to constitute an express warranty, which entitled the purchaser to recover the consideration paid where the bonds were in fact void for want of power in the municipality to issue them.—Union Bank of Richmond v. Oxford & C. L. R. Co., U. S. C. C. of App., Fourth Circuit, 143 Fed. Rep. 193.

110. TAXATION—Enrolled Vessels.—Rule that domicile of owner or actual *situs* of vessel, and not place of enrollment marked on vessel, as provided for by Rev. St. U. S., §§ 4178, 4334, was the criterion to determine the *situs* of the vessel for taxation, held not changed by Act June 26, 1884, ch. 121, § 21, 23 Stat. 58.—Ayer & Lord Tie Co. v. Commonwealth, U. S. S. C., 26 Sup. Ct. Rep. 679.

111. TAXATION—Real Property —One spouse has no estate in the realty of the other and has no interest therein which imposes any obligation to pay taxes on the real estate of the other.—Nagle v. Tieperman, Kan., 85 Pac. Rep. 941.

112. TAXATION—State Taxes.—Where state taxes in the hands of a county treasurer are lost without fault of the county, it is not liable to the state therefor.—Lancaster County v. State, Neb., 107 N. W. Rep. 388.

113. TAXATION—Use of Public Monies.—Public fund held not unconstitutionally appropriated for private use by Act Feb. 12, 1901, ch. 353, 354, 31 Stat. 767, 774, and Feb. 28, 1903, ch. 856, 32 Stat. 909, for elimination of grade crossings and for a union railway station in the District of Columbia.—Millard v. Roberts, U. S. S. C., 26 Sup. Ct. Rep. 674.

114. TELEGRAPHS AND TELEPHONES—City Ordinances. —A telephone company held to have accepted a franchise ordinance limited to 15 years, and was thereby estopped to claim rights under a previous ordinance which had been repealed.—Cumberland Telephone & Telegraph Co. v. City of Evansville, U. S. C. C. of App., Seventh Circuit, 143 Fed. Rep. 238.

115. TOWAGE—Negligence.— A tug and barge both held negligent in starting from a harbor through floating ice by which the barge was sunk while being towed on a hawser; the danger being obvious from the shape of the barge and the fact that she was wider than the tug.—The Phœnix, U. S. D. C., S. D. N. Y., 143 Fed. Rep. 350.

116. TRIAL—Nonsuit.—Where it is shown by the record that the demand for damages in an action should have been litigated in a former action to quiet title between the same parties, a motion for nonsuit should be sustained.—Shields v. Johnson, Idaho, 85 Pac. Rep. 982.

117 TRIAL—Reception of Evidence.—It was competent to permit a witness for plaintiff on rebuttal to testify whether he wrote a letter which another witness attempted to show he had written.—Bazelon v. Lyon, Wis., 107 N. W. Rep. 387.

118. TRUSTS—Duties of Trustee.—A trustee is entitled to the protection of a court of equity in the execution of trusts, and, when real and serious doubts confront him as to his duty, is entitled to the advice of the court to guide him.—Stephenson v. Norris, Wis., 107 N. W. Rep. 343.

119. WAREHOUSEMAN—Waiver of Lien.—A bank which held warehouse receipts for certain cotton as security held not to have lost the right to possession of the cotton by acceptance of a note on sale of the cotton.—National Bank of Cleburne v. Citizens' Nat. Bank, Tex., 93 S. W. Rep. 209.

120. WATERS AND WATER COURSES—Obstruction by Railroad —In the absence of negligence in the construction of its roadbed across a natural water course, railroad company is not liable for damages to property on adjacent lands by reason of an unprecedented flood.—Chicago, R. I. & P. Ry. Co. v. Buel, Neb., 107 N. W. Rep. 590.

121. WATERS AND WATER COURSES—Regulations as to Water and Light.—Where an owner of premises connects them with a city system to acquire light or water, he impliedly contracts to maintain and pay for the same in accordance with the prescribed regulations.—City of East Grand Forks v. Luck, Minn., 107 N. W. Rep. 393.

122. WILLS—Validity of Bequest.—Legacies to be paid out of testator's insurance policies, when his only insurance was payable to his wife and daughters, held not valid legacies payable from his general estate.—*In re* Tinney's Estate, 99 N. Y. Supp. 159.